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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

84148-9
NO. 84150-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROGER SCHERNER,

Petitioner.

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STATE OF WASHINGTON

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STATE'S ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

Respondent, the State of Washington, agrees that the Court should accept review in this case.

B. COURT OF APPEALS OPINION

The Court of Appeals issued a published decision in this case, State v. Scherner, ___ Wn. App. ___, ___ P.3d ___, 2009 WL 4912703 (December 21, 2009).

C. QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals properly rejected Scherner's claim that RCW 10.58.090 is unconstitutional.
 - a. Whether the application of RCW 10.58.090 to Scherner's case did not violate the ex post facto clause.
 - b. Whether the legislature's enactment of RCW 10.58.090 did not violate the separation of powers.
 - c. Whether Scherner has failed to establish that RCW 10.58.090 violates the equal protection clause.

d. Whether Scherner has failed to establish that RCW 10.58.090 violates the due process clause.

2. Whether the admission of testimony under RCW 10.58.090 is subject to the trial court's balancing of factors under ER 403.

3. Whether the trial court gave a proper limiting instruction with respect to the evidence admitted under RCW 10.58.090.

D. STATEMENT OF THE CASE

A detailed statement of the facts is set forth in the State's brief filed in the Court of Appeals.

Scherner is the grandfather of M.S. RP 462. Beginning when M.S. was five or six years old, Scherner began molesting her. RP 466-71. During the summer of 2001 or 2002, when M.S. was seven or eight years old, Scherner took her on a trip to Bellevue and molested her at a relative's house. RP 474-95. Several years later, M.S. gradually revealed the full details of the abuse. RP 496-500, 508, 575-76; Ex. 1, 2, 4 and 5.

After M.S.'s disclosures, other victims came forward. A total of ten individuals, including other family members, neighbors and family friends, reported that Scherner had molested them as

children. CP 160-66. Four of these victims ultimately testified at trial. N.K., Scherner's granddaughter and M.S.'s older cousin, revealed that Scherner had molested her when she was six or seven years old, including during a trip to Disneyland. RP 622-34. Two nieces, J.S. and S.O., also reported that when they were children, Scherner molested them at his house. RP 677-83, 904-14. Finally, S.W., the daughter of a family friend, disclosed that Scherner had molested her during a ski trip at the Lake Tahoe area. RP 656-66.

The State charged Scherner in King County Superior Court with three counts of first-degree child molestation. CP 130-32. On the scheduled trial date, Scherner failed to appear, and an arrest warrant was issued. RP 859; CP 246-47. In March of 2008, the police arrested Scherner, who was using a false identity, in Panama City, Florida. RP 449-58, 861-90.

Prior to trial, the State gave notice that it would offer the testimony from four of Scherner's prior victims under RCW 10.58.090 and ER 404(b). CP 187-206; Pretrial Ex. 5-8. Scherner challenged the constitutionality of RCW 10.58.090 and argued that the evidence was not admissible under the statute. The trial court rejected these arguments and admitted the testimony under

RCW 10.58.090 and ER 404(b). RP 104-19, 220. Prior to testimony of each witness and at the conclusion of trial, the court gave a limiting instruction. CP 263; RP 617, 654, 673, 903.

The jury found Scherner guilty as charged. CP 248-50. The court imposed standard range sentences. CP 236-45.

Scherner appealed. Among other issues, he raised a variety of constitutional challenges to RCW 10.58.090. He argued that the statute violated the ex post facto clause, the separation of powers, the equal protection clause and the due process clause. On December 21, 2009, in a published opinion, the Court of Appeals rejected these challenges and affirmed Scherner's convictions for child molestation. State v. Scherner, ___ Wn. App. ___, ___ P.3d ___, 2009 WL 4912703 (December 21, 2009). On the same date, the court published another opinion rejecting similar constitutional challenges to RCW 10.58.090. State v. Gresham, ___ Wn. App. ___, ___ P.3d ___, 2009 WL 4931789 (December 21, 2009).

E. ARGUMENT

1. REVIEW IS APPROPRIATE BECAUSE THE CASE INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

During the 2008 session, the Washington Legislature enacted RCW 10.58.090. The statute provides that in sex offense cases, evidence of the defendant's commission of another sex offense is admissible subject to the court's balancing of factors under ER 403. RCW 10.58.090 provides in pertinent part:

In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.

RCW 10.58.090(1). This statute was based upon Federal Rules of Evidence 413, 414 and 415, enacted in 1994. At least nine other states have enacted similar statutes or rules.¹ The federal and

¹ See Arizona Evid. R. 404(c); Ark. Code § 16-42-103; Cal. Evid. Code § 1108; Fla. Stat. § 90.404(2)(b); 725 Ill. Comp. Stat. 5/115-7.3; Iowa Code § 701.11; La. Code Evid. art. 412.2; Mich. Comp. Laws § 768.27a; Okla. Stat. 12, § 2413.

state appellate courts have uniformly rejected constitutional challenges to these statutes and rules.²

Scherner seeks review by this Court of his various constitutional challenges to RCW 10.58.090. While the State contends that the Court of Appeals correctly resolved the issues raised by Scherner, the State has an interest in having the highest court in the state issue a definitive ruling on these issues as promptly as possible. The Court of Appeals and virtually every superior court considering the issue have held that RCW 10.58.090 passes constitutional muster. A contrary ruling from this Court could have a significant impact on a number of sex offense cases. This Court has resolved similar constitutional challenges to statutes relating to the admissibility of evidence,³ and it would appear appropriate for the Court to do so here.

² United States v. Julian, 427 F.3d 471 (7th Cir. 2005); United States v. Mound, 149 F.3d 799 (8th Cir. 1998); United States v. LeMay, 260 F.3d 1018 (9th Cir. 2001); United States v. Castillo, 140 F.3d 874 (10th Cir. 1998); People v. Falsetta, 21 Cal.4th 903, 89 Cal.Rptr.2d 847 (1999); McLean v. State, 934 So.2d 1248 (Fla. 2006); State v. Reyes, 744 N.W.2d 95 (Iowa 2008); People v. Donoho, 204 Ill.2d 159, 788 N.E.2d 707 (2003); State v. Willis, 915 So.2d 365 (La. Ct. App. 2005); People v. Pattison, 276 Mich. App. 613, 741 N.W.2d 558 (Mich. Ct. App. 2007); State v. McCoy, 682 N.W.2d 153 (Minn. 2004); Horn v. State, 204 P.3d 777 (Okla. Crim. App. 2009).

³ See City of Fircrest v. Jensen, 158 Wn.2d 384, 393-94, 143 P.3d 776 (2006) (rejecting challenges to statute concerning admissibility of breath test evidence); State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984) (rejecting challenges to child hearsay statute).

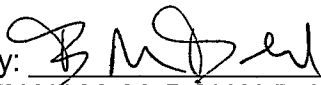
F. CONCLUSION

For all the foregoing reasons, the Court should grant the petition for review.

DATED this 6th day of February, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric Lindell, the attorney for the appellant, at 4409 California Avenue SW, Suite 100, Seattle, WA 98116, containing a copy of the STATE'S ANSWER TO PETITION FOR REVIEW, in STATE V. ROGER SCHERNER, Cause No. 84150-1, in the Washington Supreme Court.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame

Name

Done in Seattle, Washington

2/8/10
Date